On January 29, 1954, petitioner, by his counsel, supplemented the letter of January 27, stating that if the case were reopened he would prove that he had not knowingly maintained any close or sympathetic association with any member of the Communist Party, that his relations with an organization known as the Nature Friends of America, which constituted four of the five charges, were casual, intermittent and entirely innocent, and in fact that petitioner had specifically refused to become a member of the organization and had only used its facilities for outdoor recreation (Pet.'s Ex. 10, R. 27).

On February 4, 1954, the Secretary wrote petitioner's counsel denying the request for a reopening of his case, but stated: "I have reviewed the information which you have forwarded in support of your request, as well as other available information" (Pet.'s Ex. 11, R. 28). On February 10, 1954, counsel for petitioner again wrote the Secretary requesting reconsideration of the refusal to reopen. In this letter the offer of proof of January 29, 1954, was repeated and amplified. In addition, counsel pointed out the insufficiency of the original charges and questioned the constitutionality of Executive Order 10450 and the Act of August 26, 1950, 5 U. S. C. 22-1, *et seq.*, on which the Executive Order was in part based (Pet.'s Ex. 12, R. 29-31). The Secretary denied this second request on February 24, 1954, saying, "The substantive information of your letter of February 10 was considered at the time of the determination" (Pet.'s Ex. 13, R. 32); and that the separation of Mr. Cole had been accomplished in accordance with Executive Order 10450 and the security regulations of the Department; and that the validity and constitutionality of the Executive Order and the Act of August 26, 1950 (64 Stat. 476), upon which it is based, were not matters to be determined by the Department (R. 32).

On February 25, 1954, petitioner appealed his discharge to the Second United States Civil Service Region, claiming

that his discharge was in violation of Section 14 of the Veterans' Preference Act and the Rules and Regulations of the Civil Service Commission, in that: (1) he was not furnished with any and all of the reasons for his discharge; (2) that said discharge was arbitrary, capricious and not made in good faith; (3) that no notice of any adverse determination ever advised him of his right to appeal to the Civil Service Commission; (4) that the refusal to grant him a "hearing" pursuant to the request of January 27, 1954, as supplemented, was arbitrary, capricious, and not made in good faith; (5) that the refusal to reconsider the denial of the request for the "hearing" pursuant to the request of February 10, 1954, was arbitrary, capricious and not made in good faith (R. 8-9, 39).

On March 3, 1954, the Regional Director of the Second Civil Service Region advised petitioner that he could not accept his appeal inasmuch as "The Commission has held that the provisions of Section 14 of the Veterans' Preference Act of 1944 are not applicable to suspension or termination of preference civilian officers or employees by the various departments and agencies concerned under authority of Public Law 733 (81st Congress, the Act of August 26, 1950)... Accordingly, there is no right of appeal by a preference eligible to the Commission under Section 14 from an adverse action initiated under Executive Order 10450" (Pet.'s Ex. 14, R. 33-34). On May 5, 1954, the decision of the Regional Director was approved by the United States Civil Service Commission, to which it had been appealed (Pet.'s Ex. 15, R. 35-36).

B. Court Proceedings

On May 28, 1954, petitioner filed a complaint in the United States District Court for the District of Columbia, praying for a declaratory judgment declaring invalid his discharge by the Secretary of Health, Education and Welfare pursuant to the provisions of the Act of August 26, 1950 as purportedly extended by Executive Order 10450,

and for a declaration that the refusal of respondent Young, Chairman of the United States Civil Service Commission, to hear petitioner's appeal from the Secretary's adverse determinations was illegal. Petitioner prayed further for an Order restoring him to his position as a Food and Drug Inspector as of the date of his discharge.

An answer was filed on August 30, 1954. On September 8, 1954, an Order was entered granting petitioner's motion to amend his complaint by adding as parties defendant George M. Moore and Frederick J. Lawton, members of the United States Civil Service Commission. It was stipulated by counsel that the answer which was filed was adopted by the additional defendants.

After the filing of the answer, petitioner and respondents filed cross-motions for judgment on the pleadings. On October 26, 1954, the District Court granted respondents' motion for judgment on the pleadings and dismissed the amended complaint (R. 53). Jurisdiction of the cause in the District Court was based on 28 U. S. C., Sections 1331, 2201 and 2202. The Court of Appeals, by a 2-1 vote, affirmed, Chief Judge Edgerton dissenting (R. 55-63).

Summary of Argument

The issues presented by this case raise questions of fundamental importance to the Government of the United States, our democratic society, and millions of government employees. The decision of the court below removes from government service as a "security risk" a concededly loyal employee who had no access to any government secrets or classified information and who occupied a position not involving the making of policy. Inasmuch as the criteria of Executive Order 10450 (Appendix "A", *infra*, pp. 59-61), cover virtually every aspect of "employee suitability," the decision below deprives thousands of

government employees in non-sensitive positions of the procedural safeguards of the Lloyd-La Follette and Veterans' Preference Acts whenever it is asserted in the name of "security" that they are "unsuitable" for Federal employment.[2]

The issues, which are before this Court for the first time, arise from the Federal Employees' Security Program, based upon the Act of August 26, 1950 (64 Stat. 476, 5 U. S. C. 22-1 to 22-3). As stated by Chief Judge Edgerton in his dissent below:

> "In the Lloyd-LaFollette Act and the Veterans' Preference Act, Congress limited the President's control over removals (from the classified civil service). No one claims that these limitations are unreasonable. By the Act of August 26, 1950, Congress authorized exceptions to these limitations 64 Stat. 476, 5 U. S. C. 22-1, 22-3. The question is whether this case is within the exceptions." (226 F. 2d 337, 341.)

On all the questions raised by petitioner below, the Court of Appeals was divided. Petitioner contends, with Chief Edgerton, that the majority erred. His challenge is not premised upon any "right" to federal employment as such, but upon procedural rights enacted by Congress for the protection of civil servants in the Veterans' Preference and Lloyd-LaFollette Acts and in the Act of August 26, 1950, itself. He contends that these rights were violated and that his dismissal was without legal justification.

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[2] There are now approximately 2,300,000 federal employees covered by the security program. From May 28, 1953, through September 30, 1954, 3,002 federal employees were terminated under Executive Order 10450. Of those terminated, 1,645 occupied "non-sensitive" positions. (*Hearings, Senate Subcommittee; Committee on Government Operations on S. J. Res. 21*), 84th Cong., 1st Sess., March 16, 1955, pp. 515, 533, 569-570.

I

The Act of August 26, 1950 (5 U. S. C. 22-1), could not have been applied by the agency head to petitioner, a concededly loyal employee holding a non-sensitive, non-policy-making position in an agency not primarily involved in national defense or security matters; Executive Order 10450, which purported to extend the statute to petitioner, is void in that the President was not authorized by Section 3 (5 U. S. C. 22-3) to extend the provisions of Section 1 of the Act to such an employee. The statute cannot be applied where there is no nexus between the employee's job and the nation's defense, preparedness or similarly related programs.

II

Executive Order 10450, which establishes a rigid, single standard for *all* government employment—irrespective of the degree of the sensitivity of that employment—is in contravention of the statute and void. The power of the President under Section 3 (5 U. S. C. 22-3) is limited to an extension of the provisions of Section 1 (5 U. S. C. 22-1) to agencies and departments not specifically included in that section. Assuming, *arguendo*, the power of the President to extend Section 1 of the Act to each and every agency of the government, he had no power whatever to extend it to *each and every employee* in each and every agency without regard to the sensitivity of the employee's position. The extent to which the statute was to be applied within any particular agency was left specifically by Congress to the discretion of the agency head concerned. Executive Order 10450, which establishes "clearly consistent with the interests of the national security" as the mandatory single standard for all government employment, effectively divested the agency head of statutory discretion in security matters. This is clear from the *conceded* facts. Petitioner was loyal; he had no access to classified information or government secrets; he did not occupy a policy-making position. Accordingly, petitioner's continuing

association with alleged "subversives" could not possibly result in the disclosure of "secret" or "classified" information or material. His discharge, therefore, could not conceivably have been justified as "necessary or advisable in the interest of the national security." Either the agency head was divested of statutory discretion by the mandatory requirements of the Executive Order, or petitioner's discharge under the statute was patently arbitrary and discriminatory.

III

The statutory standard of employee discharge provides that the agency head "may" discharge an employee when, in his discretion, such action is "necessary or advisable in the interest of the national security" (5 U. S. C. 22-1). The standard of employee discharge of Executive Order 10450 is that no employee shall be retained in employment unless retention is affirmatively established to be "clearly consistent with the interests of the national security." This latter standard is made applicable by the Executive Order to each and every employee of the federal government, irrespective of the sensitivity of the employee's position. The change from the "necessary or advisable" standard of the statute to the "clearly consistent" standard of the Executive Order is the adoption of a more rigid test of suitability for federal employment, contemplating the possible existence of information which, while not capable of inducing a belief that an employee's dismissal is "necessary or advisable in the interest of the national security," does cause doubt as to whether his continued employment is "clearly consistent with the interests of the national security." Therefore, to the extent that the Executive Order cuts off petitioner's rights under the Veterans' Preference and Lloyd-LaFollette Acts, it is inconsistent with the statute and void.

IV

Apart from any other consideration, the Act of August 26, 1950, Section 1, as extended to the Department of Health, Education and Welfare by Executive Order 10450, requires that an employee who is terminated receive "a written statement of the decision of the agency head." The decision of the agency head on January 15, 1954, terminating petitioner's employment effective January 20, 1954, failed to set forth any of the reasons for the adverse determination except to refer to the letter of charges and petitioner's refusal to reply thereto. This notification was not in compliance with the Act of August 26, 1950's statutory proviso (5 U. S. C. 22-1) requiring the receipt by the employee of "a written statement of the decision of the agency head."

ARGUMENT

I

The Act of August 26, 1950, was invalidly extended by Executive Order 10450 to petitioner and was invalidly applied by the agency head to remove him—a loyal employee doing non-security work in a non-sensitive agency.

Kendrick M. Cole is an honorably discharged veteran who, prior to January 20, 1954, held a permanent position in the classified federal civil service as Food and Drug Inspector. His job consisted of inspecting and sampling foods, drugs and cosmetics for conformity to federal regulatory standards.[3] This work did not involve or affect the

[3] In addition to factory inspection, such inspectors frequently take samples of the inspected item to Food & Drug Administration laboratories for more precise analysis and testing. See *Inspectors Manual*, Food & Drug Administration (U. S. Government Printing Office, 1945, as supplemented).

formulation of public policy, nor did it entail access to classified government material or other state secrets (R. 40). It was a demanding, highly skilled, but undramatic job which petitioner ably performed until the time of his termination. Moreover, it is admitted that his loyalty to the United States was never in question even at the time of his discharge. Accordingly, it is clear that petitioner's removal "in the interest of the national security" was invalid.

Petitioner was an "inferior official" within the meaning of the second clause of Article II, Section 2 of the Constitution. Congress, having vested his appointment in the department head (the Secretary of Health, Education and Welfare), could also prescribe the conditions of his removal. *See United States* v. *Perkins*, 116 U. S. 483. It did so in Section 6 of the Lloyd-LaFollette Act,[4] Section 14 of the Veterans' Preference Act,[5] and in the Act of August 26, 1950, at issue here.

Both the Lloyd-LaFollette Act and the Veterans' Preference Act provide that members of the classified civil service shall be suspended or removed only for causes which will promote the "efficiency of the service". Under these laws they are entitled to notice of the charges against them, a reasonable time in which to answer, a written decision stating the reasons for suspension or removal, if that action is taken, and, in the case of veterans' preference eligibles, such as petitioner, the right of appeal to the Civil Service Commission (including personal appearance or appearance by counsel before the Commission), whose decision is made binding on the employing

[4] Section 6 of the Act of August 24, 1912, 37 Stat. 555, as amended, 5 U. S. C. 652.

[5] Section 14 of the Act of June 27, 1944, 58 Stat. 390, as amended, 5 U. S. C. 863. See 5 C. F. R., §§ 22.1 to 22.11.

agency.[6] If petitioner had been terminated for the efficiency of the service, he would have been entitled to these procedural rights.[7]

In the Act of August 26, 1950, Congress created a limited exception to the Lloyd-LaFollette and Veterans' Preference Acts by providing that the heads of certain departments and agencies named in Section 1 of the Act (5 U. S. C. 22-1) might in their absolute discretion suspend and thereafter, "when necessary or advisable in the interest of the national security," terminate any officer or employee in those departments. This statute drastically reduced the procedural protections to civil servants in cases where it applied. First, it provided for suspension prior to the issuance of charges. Second, it stated that charges should be stated only as specifically as security considerations permit. Finally, it cut off the employee's right to appeal to the Civil Service Commission, by providing that the decision of the agency head (required in all termination cases) "shall be conclusive and final."

Only certain "sensitive" agencies were named in Section 1 of the 1950 statute, and the Department of Health, Education and Welfare was not among these. However, by Section 3 of the Act (5 U. S. C. 22-3), the President was authorized to extend the substantive provisions of Section

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[6] Under Section 15 of the Veterans Preference Act, 5 U. S. C. 864, any employee fired for reasons other than "delinquency or misconduct," as was petitioner, may request the Commission to have his name placed on civil service registers and employment lists for reemployment in another position for which he is eligible.

[7] Even under the so-called "loyalty program," Executive Order 9835, 12 F. R. 1935 (May 27, 1947) as amended by Executive Order 10241, 16 F. R. 3690 (May 1, 1951), revoked by Executive Order 10450 (April 27, 1953), the court below had held that a veteran terminated on loyalty grounds was nonetheless entitled to the procedural protections of Section 14 of the Veterans' Preference Act. *Kutcher* v. *Gray* (C. A. D. C.), 199 F. 2d 783.

1 to such other departments and agencies as from time to time he might "deem necessary in the best interests of national security." With one minor exception,[8] he did not exercise this authority until April 27, 1953. Therefore, from August 26, 1950, to April 27, 1953, although the loyalty program was still in effect throughout the government, the provisions of the 1950 statute had not been made applicable to the Department of Health, Education and Welfare which employed petitioner.

On April 27, 1953, the President, "deeming such action necessary in the best interests of the national security" (Preamble, Executive Order 10450), ordered that the provisions of the Act "shall apply to all other departments and agencies of the government." He also specifically purported to extend the Act's coverage to each and every civilian officer and employee of the Executive Branch under the standard—"clearly consistent with the interests of the national security"—and thus did away with any rights petitioner might otherwise have had under the Veterans' Preference Act and the Lloyd-LaFollette Act (37 Stat. 555, 5 U. S. C. 652).

However, the text of the Act of August 26, 1950, plainly shows that the statute could not validly have been applied to petitioner *either by the agency head or the President's Executive Order*. The crucial standard for application of the Act's provisions is contained in the phrase, "in the interest of the national security," for it is only this interest which can justify suspension (when "necessary" in that interest) and termination (when "necessary or advisable" in that interest) of employees pursuant to the statute.

On the face of it, this standard, "the interest of the national security," is not free from vagueness; it allows

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[8] By Executive Order 10237, 16 F. R. 3627, President Truman extended the provisions of the Act to the obviously "sensitive" Canal Zone.

for executive judgment in doubtful cases. Yet, it is obvious that that interest is by definition limited to cases where there is a rational relationship between the employment in question and the actual security of the nation. On the conceded facts, this is a case beyond those limits. Indeed, nowhere in this case have respondents been willing or able to indicate how petitioner's continued employment could not have been "clearly consistent with the interest of national security," as the Secretary stated in terminating him. Yet, it bears repeating, it was only in the "interest of the national security" that the Secretary was authorized to dismiss him under the 1950 act.

In the light of these considerations and of the plain wording of the statute itself, the Act of August 26, 1950, cannot be read as giving carte blanche authority for the cashiering of petitioner and others like him without regard to the actual interest of the national security. We believe this Court need go no farther than the text of the Act to reach that conclusion, and thus find that the court below erred and that petitioner was invalidly terminated. This conclusion is not based on semantics alone, for Congress had an unmistakable purpose in passing the Act of August 26, 1950. That purpose was the creation of a permanent legislative authority for the summary dismissal of employees whose character, personality and background, *when considered relationally to the sensitivity of their employment*, rendered it necessary or advisable that they not be allowed to continue holding jobs which were vitally involved in our national defense and preparedness programs. That purpose, as we shall show, emerges strongly and clearly from the statute and its legislative history, and just as it was the justification for the authority, so it is also the measure of that authority; for it is elementary that "Official powers cannot be extended beyond the terms and necessary implications of the grant," *Federal Trade Commission* v. *Raladam*, 283 U. S. 643, 649. See also *Stark* v. *Wickard*, 321 U. S. 288, 309.

A. The "Congressional Purpose"

The Act of August 26, 1950, was enacted to *supplement* the "Loyalty Program" (Executive Order 9835, 12 F. R. 1935) in agencies concerned with vital matters affecting the national security, *H. Rep. No. 2264*, 80th Cong., 2nd Sess., p. 2 (1948). This is made clear by the report of the Armed Services Committee of the Senate, *S. Rep. No. 2158*, 81st Cong., 2nd Sess., pp. 1-2 (1950), which stated:

> "The purpose of the bill is to increase the authority of the heads of Government Departments engaged in sensitive activities to summarily suspend employees considered to be bad security risks. * * * It will be noticed that the bill, as amended, is not designed to set aside the President's loyalty program. It is intended that this program will be continued. Executive Order 9835 of March 21, 1947, established procedures under which employees found to be disloyal, as distinct from poor security risks, could be removed from the Federal Government. This bill is concerned primarily with the problem of dealing with those employees who, although loyal, are so careless as to jeopardize the national security. Disloyal persons should not be permitted to be employed in the Federal service under any circumstances. They are not entitled to Federal employment of any kind."

1. The Standard of Coverage

The Act of August 26, 1950, in providing that a stated group of department and agency heads "may, in (their) absolute discretion and, when deemed necessary [or advisable] in the interest of national security, suspend, [and thereafter terminate] any civilian officer or employee * * *" is *permissive* in application. The use of the word "discretion" leaves little doubt that Congress intended the Agency Head to make the sole determination as to the extent of the Act's application within his own agency. The only limitation on the agency head is the Congressional requirement that his discretion be exercised only when

"necessary or advisable in the interest of the national security."

The Act of August 26, 1950, mentions the President only twice: Section 3 (5 U. S. C., 22-3), provides that the Act shall apply to agencies and departments other than those referred to in Section 1, "as the President may, from time to time, deem necessary in the best interests of national security," and that the President shall report to Congress on any such extensions to other agencies and departments. For the rest, the statute is a direct grant by Congress to the agency and department heads covered under it. The President is given no authority to limit, vary or enlarge this grant, nor is he authorized to divest an agency head of his discretion to determine, under the legislative standard—"when necessary or advisable in the interest of the national security"—the extent of the Act's coverage within the confines of his own department.[9]

2. The Standard of Employee Termination

Section 1 of the Act of August 26, 1950, establishes the standard to be followed by an agency head in determining whether a particular employee should be retained or terminated. The standard is set forth in the statute as follows:

> "The agency head concerned *may*, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine *such termination necessary or advisable in the interest of the national security of the United States* • • •" (Emphasis supplied.)

The standard of termination, like the standard of coverage, is *permissive* in application, depending upon the

[9] See *e.g.*, testimony of Assistant Attorney General Tompkins before the *Senate Subcommittee on Government Operations on S. J. Res. 21*, 84th Cong., 1st Sess., March 18, 1955, pp. 59-60.

"sensitivity" of the employee's position. As explained to the Senate Armed Service Committee by Felix Larkin, then Defense Department General Counsel:

> "If the question is discharge for loyalty reasons, of course he is disqualified from being reemployed any place else. If he were to be terminated by a sensitive agency like Defense, as herein provided for security purposes, not for loyalty but for security, he is being terminated by us because we cannot find a nonsensitive job for him in our agency. If we find a person who we feel is a security risk because he happens to be handling classified material, we will attempt to find him a nonsensitive job where he is not a security risk," (*Hearings, Senate Committee on Armed Services on H. R. 7439*, 81st Cong., 2nd Sess., July 20, 1950, p. 13).

Congress was informed that the statute would give agency heads latitude in safeguarding national defense secrets for which the agency heads alone were responsible. Termination or transfer was to be dependent in each case upon the relative sensitivity of the employee's position and the possibilities of reemployment within the agency in a nonsensitive position.

> "The Secretary of one of these departments dealing with national defense secrets is responsible for the quality of the administration of his department and its security requirements to a unique degree. When an employee * * * is likely to be a poor security risk, the responsibility for deciding the proper action rests with that secretary. * * * An indiscretion by a civilian employee in one department might be of no significant consequence elsewhere. Within a department there would be degrees of security and variations in attendant risks." (Dan A. Kimball, Undersecretary of the Navy, testifying before the *House Committee on Post Office and Civil Service, on H. R. 7439*, 81st Cong., 2nd Sess., March 30, 1950, at pp. 69-70.)

Congress accordingly vested sole discretion in the agency head to determine whether an employee should be terminated, transferred or retained. The only Congressional limitation on the agency head's discretion to terminate is the requirement that its exercise be "necessary or advisable in the interest of the national security."

B. The Legislative Background

The Bill which eventually became the Act of August 26, 1950, was first introduced in the Senate during the 80th Congress (S. 1561). During the Hearings before the Senate Armed Services Committee, Arthur Fleming, a member of the Civil Service Commission, pointed out that S. 1561 would destroy the appeal rights of veterans under Section 14 of the Veterans Preference Act and that the Committee should be careful not to extend its coverage to government agencies not directly involved in national security matters, *Hearings, Senate Armed Services Committee on S. 1561,* 80th Cong., 2nd Sess., Feb. 27, 1948, pp. 14-16. Thereafter, the Bill was amended in committee to permit the President to determine "additional" sensitive areas and to include them within its scope. *S. Rep. No. 1155,* 80th Cong., 2nd Sess., p. 3 (1948). In explaining the amendment, the committee stated:

> "Insofar as * * * [this] Amendment is concerned, it was recognized by all witnesses that there were other sensitive areas within the various departments of the Government which are now or might in the future become, deeply involved in national security. After considerable discussion, it was agreed that it would be impossible to name all such agencies but it was felt that the bill should be specifically broadened to include other agencies of the Military Establishment. * * * The National Advisory Committee for Aeronautics requested that they be included and because of the nature of their work, it is believed that they are vitally connected with the defense structure and it was proper to specifically include

> them. * * * In view, however, of the fact that there are now and will be in the future, other sensitive areas of equal importance to the national security, it is believed that the President should have authority to make a finding concerning such areas and by Executive action place those areas under the authority contained in this Act." *S. Rep. No. 1155, supra*, at p. 4 (1948).

The Bill failed to pass the House because of lack of time and was reintroduced as H. R. 7439, 81st Congress, 2nd Session, having been drafted by the Defense Department and introduced at its request, *Hearings, House Committee on Post Office and Civil Service, on H. R. 7439*, 81st Cong., 2nd Sess., March 7, 1950, pp. 2, 3.

1. Restriction to Sensitive Areas

The restrictive purpose of the Act was stated in the House Committee Report. (*H. Rep. No. 2330*, 81st Cong., 2nd Sess. (1950), p. 4), as follows:

> "The Bill does not deal with the suspension or removal of disloyal Federal employees * * *. This bill is concerned with the all-important problem of dealing with those Federal employees who although loyal to the United States, act in a manner which jeopardizes national security, either through wanton carelessness or general disregard for the public good."

See also: *S. Rep. No. 2158*, 81st Cong., 2nd Sess. at p. 2 (1950).

Those described in the aforementioned Report were not the only persons who might, when employed in sensitive positions, be security risks:

> "Senator Bridges: People like a drunkard or a sexual pervert?

> "The Chairman: Or a person who talks and talks and talks.
>
> "Mr. Larkin: Or a person who associates with persons who belong to the Communist Party or any of the agencies on the Attorney General's list, but against whom there is no proof he is a Communist as such himself but who by virtue of his continued association becomes a tremendous risk for us to keep in a sensitive job where he is continually every day getting highly classified material." *Hearings, Senate Committee on Armed Services, on H. R. 7439*, 81st Cong., 2nd Sess., July 20, 1950, p. 8.

The similarity of the last hypothetical to the charges against petitioner is striking, *except that petitioner held no sensitive job.*

Of course, *disloyal* persons were also security risks *insofar as they worked in sensitive positions.* Mr. Larkin put it thus:

> "They are security risks because of their access to confidential and classified material * * *. But if they do not have access to classified material, why, there is no notion that they are security risks to the United States." *Hearings, House Committee on Post Office and Civil Service, on H. R. 7439*, 81st Cong., 2nd Sess., March 30, 1950, at p. 67.

This was quite apart from their general undesirability as federal employees, for their dismissal on the latter ground required a full observance of their procedural rights under the Lloyd-LaFollette and Veterans' Preference Acts, *Kutcher* v. *Gray* (C. A. D. C.), 199 F. 2d 783; *Bailey* v. *Richardson* (C. A. D. C.), 182 F. 2d 46, affirmed by an equally divided Court, 341 U. S. 918. However, it was iterated and reiterated throughout the history of the bill that such persons were only dangerous because of their access to classified material or their ability to make or

strongly influence policy.[10] See, e.g., *Hearings, House Committee on Post Office and Civil Service, on H. R. 7439*, 81st Cong., 2nd Sess., March 7, 23, 30, 1950, pp. 10, 18, 21, 25, 41, 43, 60, 67, 89; *Hearings, Senate Committee on Armed Services on H. R. 7439*, 81st Cong., 2nd Sess., July 20, 1950, pp. 7, 8, 17; House Debates, 96 C. R. 10016, 10017, 10019, 10026.

2. Procedural Limitations

It was this very fact, that the Act of August 26, 1950, was limited to sensitive positions and that it authorized dismissal only "in the interest of the national security" (rather than in the name of some vague feeling that *all* federal employees ought to be of clean character and stolid habits), that explained the lack of an appeal procedure in the statute. Amendments which would have provided for an appeal by a dismissed employee to an outside review agency were defeated in the House of Representatives *96 C. R. 10017 ff.* principally because such a review would involve the divulgence of the very secrets intended to be protected under the statute:

> *"Of course we want to have an appeal to an independent board by employees who are not doing sen-*

[10] Captain McDill, Navy Department Director of Legislation, stated:

> "The type of case [covered by] * * * the authority [of] this measure are those infrequent situations where the employee involved *occupies a key position or a position of trust*, and where the evidence at hand is sufficient to require continuing surveillance and where the evidence raises a serious question as to the individual's fitness and reliability *from a security standpoint in such a position* as he currently occupies. For example, sobriety, discretion, trustworthiness, selection of friends and acquaintances, and the entire sphere of an individual's activities are factors which must be given thorough scrutiny when a person *occupies a key position or one of trust involving access to or connection with classified material.*" *Hearings, House Committee on Post Office and Civil Service, on H. R. 7439*, 81st Cong., 2nd Sess., March 7, 1950, p. 19 (Emphasis supplied.)

> *sitive work and who are not doing highly secret defense work*; but employees doing highly secret work in our defense agencies are in a different category." *96 C. R. 10017*, Remarks of Rep. Murray.[11] (Emphasis supplied.)

The intent to limit the Act of August 26, 1950, to sensitive employment was reflected in other features of the statute, *e. g.*, the fact that the Act only applied originally to certain obviously crucial agencies and was only to be extended as *necessary* in the best interests of national security; the limitation on the disclosure of charges against an employee (*i. e.*, only "as security considerations permit"); the provision for the reemployment of dismissed employees in other capacities with the approval of the Civil Service Commission, *S. Rep. No. 2158*, 81st Cong., 2nd Sess., p. 2 (1950); *H. Rep. No. 2330*, 81st Cong., 2nd Sess., p. 4 (1950).

The sum of these procedural limitations, justified solely by the premise that dismissals under the statute would involve inquiry into questions of national security, is the essence of the difference between the Act of August 26, 1950, and the Lloyd-LaFollette and Veterans' Preference Acts.

For the very same reason, the Act of August 26, 1950, was intended to be applied only where necessary for security reasons by reason of the nature of the job, *i. e.*, its sensi-

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[11] Mr. Larkin explained the opposition of the Department of Defense to an independent agency review of "security risk" dismissals as follows:

> "I think by setting up a review agency of this kind it means that they have to then go in and determine the sensitivity of the job, they have to find out the types of classified material that are alleged to be classified, and what they are—they have to go into a lot of matters of that character which I think not only complicates it, but I think they have no right to go into." *Hearings, Senate Committee on Armed Services on H. R. 7439*, 81st Cong., 2nd Sess., July 20, 1950, p. 29.

tivity.[12] *All* other employees, regardless of the nature of the charges against them, were entitled to their full procedural rights under the older statutes.

C. Administrative Construction Prior to Executive Order 10450

The aforestated basic purpose and limitation in the statute was fully understood in the Executive Branch. As we have demonstrated heretofore, it was the Defense Department which drafted the original bill that became the Act of August 26, 1950, and officials of that Department first explained the meaning and contemplated operation of the proposed law. They were unanimously of the opinion that it could apply only to sensitive positions or sensitive agencies. Indeed, even prior to the passage of the Act, these witnesses testified that the Department of Defense had by its own security regulations distinguished between sensitive and non-sensitive jobs. What they sought in proposing H. R. 7439 was permanent authority for these regulations (see House and Senate *Hearings* throughout, *e. g.*, testimony of Messrs. Larkin, Kimball, Goodrich, Klein).

After the passage of the Act of August 26, 1950, the regulations adopted by the Defense Department, effective January 19, 1951, explicitly took into account the distinction between "sensitive" and "non-sensitive" positions within the Department itself. *Department of Defense Security Regulations, Section 3(a),* (quoted in Bontecou,

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[12] Some members of the Senate Armed Services Committee thought the bill should be applicable to all government employment. *Hearings, Senate Committee on Armed Services on H. R. 7439,* 81st Cong., 2nd Sess., July 20, 1950, p. 13. The General Counsel of the Department of Defense, who had drafted the bill, took sharp issue with this assertion. (*Hearings, supra,* pp. 15, 17). The decisive fact, of course, is that the bill, as reported and finally passed, did not apply to all Federal employment. Senator Hunt's motion to amend the bill to provide that the provisions of the law "shall apply to all other departments" (*id.*, at p. 25), was defeated in committee (*id.* at p. 26).

"The Federal Loyalty-Security Program," [New York, 1953] at p. 349). The rule was applied by the Defense Department prior to the promulgation of Executive Order 10450, even when the employee was accused of disloyalty; disloyal employees in sensitive jobs being processed simultaneously under Executive Order 9835 (12 F. R. 1935) and the Act of August 26, 1950. *Department of Defense Security Regulations, Section 2(b),* (quoted in Bontecou, *supra,* at p. 349).

Thus, an employee "cleared" on loyalty grounds might have been terminated under the Act of August 26, 1950—but only where he held a "sensitive", or other key position, within the Defense Department itself.[13]

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[13] This was explained in Committee by Messrs. Larkin and Kimball:

"Mr. Larkin. * * *A person is accused of being disloyal, but is cleared by the loyalty board, because there is not enough evidence against him. If that person is not in a sensitive job, it is not of any further concern to us. We are willing to take the view, that while we might have misgivings about his loyalty, he cannot prejudice our security because he does not have access to any of the classified or top secret material.

"Mr. Miller. The point is that here is a case where a man is accused of being disloyal. He is brought before the loyalty board. You cannot make the charge stick, so now you are going to get him through this other process?

"Mr. Larkin. If his job happens to be a sensitive job.

"Mr. Kimball. Let me give you an illustration. We had a fellow working who was accused of disloyalty and cleared of it. But he was married to a woman whose family around him were all Communists. He associated with those people all the time. We could find nothing disloyal about him. We were not even sure that he was a bad security risk except that he was associating with Communists. So we offered him a position in another part of the country, where he would not have access to the kind of material he might have access to here. He took it and we were satisfied. We just moved him away from here. But if he had not been willing to move, we must have the power to remove him from our rolls, because we would not keep a fellow there that was associating with Communists." *Hearings, House Committee on Post Office and Civil Service on H. R. 7439,* 81st Cong., 2nd Sess., March 30, 1950, pp. 72-73.

One of the most considered administrative explanations of the statute is contained in "*A Report By the Inter-Departmental Committee on Internal Security on the Government Employee Security Program,*" April 29, 1952, (White House Mimeograph Release No. 3326, August 8, 1952), hereafter referred to as "*The Report on the Security Program.*" Relevant portions of the *Report* are set forth in Appendix "B" of this brief, *infra*, pp. 62-66.

In substance, "*The Report on the Security Program*" defines "the interest of national security" as used in the Act of August 26, 1950, solely in relation to the safeguarding of the United States against attempts to destroy or weaken it by force or violence, subversion, or any other means. The areas to be safeguarded are military, foreign relations, and related matters of the government, the disclosure or compromise of which would aid the enemies of the United States or would endanger its defense. The *Report* makes it clear that:

> "the term national security does not include questions of policy or judgment with respect to other governmental matters relating to the general welfare, health and happiness of our people in their economic and political life, not requiring security classification" (*infra*, at pp. 65-66).[14]

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[14] Cf. and compare the definition of "national defense" as used in the Espionage Act of 1917, 18 U. S. C. 791, *et seq.*: *Gorin* v. *United States*, 312 U. S. 19; *Heine* v. *United States* (2 Cir.), 151 F. 2d 813, cert. den., 328 U. S. 833; *Slack v. United States* (6 Cir.), 203 F. 2d 152, 155-156, cert. den., 346 U. S. 140; *Posen* v. *United Aircraft Products*, 201 Misc. 260, 111 N. Y. S. 2d 261. See also the doctrine of evidentiary privilege against disclosure of matters involving military affairs: *United States* v. *Reynolds*, 345 U. S. 1; *United States* v. *Coplon* (2 Cir.), 185 F. 2d 629, 640, cert. den., 342 U. S. 920; *Ticon Corp.* v. *Emerson Radio & Phonograph Corp.*, 206 Misc. 727, 134 N. Y. S. 2d 716; *Wigmore on Evidence* (3d Ed.), Vol. 8, Sec.'s 2378(a), 2379; Newman, "*Control of Information Relating to Atomic Energy*," 56 Yale L. J. 769, 787-792.

Thus, both the legislative and executive branches of the government recognized that the Act of August 26, 1950, which provides for the suspension and termination of government employees when necessary or advisable "in the interest of the national security," does not deal with employees holding non-sensitive, non-policy-making positions in agencies not primarily involved in vital defense or national security matters. *S. Rep. No. 2158*, 81st Cong., 2nd Sess., pp. 1-2 (1950); *H. Rep. No. 2330*, 81st Cong., 2nd Sess., pp. 1-4 (1950); *H. Rep. No. 2264*, 80th Cong., 2nd Sess. p. 2 (1948). They were fully aware that it applies only to employees who, intentionally or inadvertently, might harm the nation's security interests by virtue of the sensitivity of the positions held, *Hearings, House Committee on Post Office and Civil Service on H. R. 7439*, 81st Cong., 2nd Sess., March 7, 23, 30, 1950, pp. 19-21, 25-26, 60, 64-65, 67-68, 69-73, 88-89; *A Report by the Inter-Departmental Committee on Internal Security on the Government Employee Security Program*, April 29, 1952 (White House Mimeograph Release No. 3326, August 8, 1952, pp. 13-16, 27).

Apart from this recognition by the legislative and executive branches, the application of the "security" program to "sensitive" positions, as distinguished from "non-sensitive" ones, has been widely recognized elsewhere.[15] According to Miss Eleanor Bontecou, perhaps the leading writer in the field:

> "The security question arises and the judgment on it is made only in connection with positions which are classed as 'sensitive'; that is, where an employee may in fact have access to secrets, or be able to influence policy against the interests of his own country. A security judgment is a relative one. Some positions are more sensitive than others, and

[15] This recognition has been adopted and is clearly spelled out in New York State's Security Risk Law (L. 1951, ch. 233), *McKinney's Unconsolidated Laws of New York*, Section 1101, *et seq.*

> the more important the secret to which an employee may have access the stricter must be the tests applied." (Bontecou, *"The Federal Loyalty-Security Program"* [New York, 1953], pp. 48-49.)

There is no question that a disloyal employee in a "sensitive" position is an "aggravated security risk" (Bontecou, *supra*, at pp. 50-51), but a Food and Drug Inspector who is accused of maintaining a "sympathetic association" with Communists and donating funds to the "Nature Friends of America" presents no risk to "security" where the position he holds is "non-sensitive." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 181-182 (Douglas, J., concurring). Mr. Justice Steuer of the New York Supreme Court put it thus:

> "It is a bit difficult to visualize how a wash room attendant in his official capacity can give aid to his country's enemies." (*Application of Pinggera*, 206 Misc. 615, 134 N. Y. S. 2d 166, 168.)[16]

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[16] See also: *Fitzgerald* v. *Sperry Gyroscope Co.*, 22 L. A. 186, aff'd 283 App. Div. 1036; *Sperry Gyroscope Co.* v. *Engineers Association*, 106 N. Y. S. 2d 597, 599, rev'd on other grounds, 278 App. Div. 630, aff'd 304 N. Y. 582; *Fitzgerald* v. *City of Philadelphia*, Penn. Comm. Pleas Court, No. 6212, Sept. Term, 1952, *"New York Times,"* May 5, 1953, aff'd 376 Pa. 379, 102 A. 2d 887. The non-judicial authorities are in accord: Bontecou, *supra*, at pp. 48-49; Brown, *"The Operation of Personnel Security Programs,"* ANNALS, American Academy of Political and Social Science (1955), pp. 77-78; *Goldbloom, "American Security and Freedom"* (New York, 1954), pp. 32-34; *"Loyalty in a Democracy," Public Affairs Pamphlet* No. 179 (New York, 1952), at p. 6; Emerson and Helfeld, *"Loyalty Among Government Employees,"* 58 Yale L. J. 1, 136-137; Jahoda and Cook, *"Security Measures and Freedom of Thought,"* 61 Yale L. J. 295, 300-301; *XI, Bul. of Atom. Scientists*, April, 1955, pp. 110-11, 121, 146, 163.

D. Necessity for Restrictive Construction

This Court has repeatedly held that "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts on that score." *United States v. Jin Fuey Moy*, 241 U. S. 394, 401. See also: *United States* v. *Rumely*, 345 U. S. 41, 45. Accordingly, we press the constitutional argument as an aid to statutory construction.

In *Ex parte Mitsuye Endo*, 323 U. S. 283, this Court held that an American citizen of Japanese descent whose loyalty was conceded could not constitutionally be held in a War Relocation Center, but must be unconditionally released. The Court found that the wartime evacuation and detention program, established to provide for the removal of persons from designated areas when "necessary in the interests of the national security" (*id.* at p. 300). was an emergency measure for the protection of the war effort against espionage and sabotage. "A citizen who is concededly loyal presents no problem of espionage or sabotage * * *. He who is loyal is by definition not a spy or a saboteur" (*id.* at p. 301).

Obviously, since it is conceded that petitioner had no access to "classified information" or Government secrets and was not in a policy-making position (R. 40), associations with alleged "subversives" could not result in petitioner's *inadvertent* disclosure of secret information to a potential enemy. Inasmuch as it was conceded below that petitioner is not alleged to be disloyal, he could not, by definition, be deemed a potential saboteur of the food supply. Neither espionage, nor sabotage, nor inadvertent disclosure of "classified information" is involved in petitioner's case. Consequently, it is not even "within the realm of possible contemplation" that his discharge could have been justified as "necessary or advisable in the interest of the national security." Rather, it is clear that his

discharge under the authority of 5 U. S. C. 22-1 was patently arbitrary and discriminatory. *Wieman* v. *Updegraff*, 344 U. S. 183, 192.

If, as held by the majority below (226 F. 2d 337, 339), the "plain meaning" of the statute authorized petitioner's discharge on these conceded facts, the statute is unconstitutional. The "grounds" on which petitioner was terminated under the statute charged him with acts of *association* only (Pet.'s Ex. 3, R. 16-18). Allegations of "close association" with individuals "reliably reported" to be Communists, and a "sympathetic association" with a "subversive" group of nature lovers cannot, in the light of the First Amendment, exclude from public employment an otherwise loyal employee occupying a "non-sensitive" job in a "non-sensitive" agency. Cf. *Schneiderman* v. *United States*, 320 U. S. 118, 136; *Hague* v. *C. I. O.*, 307 U. S. 496; *American Communications Ass'n* v. *Douds*, 339 U. S. 382. Moreover, the "grounds" for dismissal are unconstitutionally vague and uncertain. Cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, at p. 176 (Douglas, J., concurring); *Burstyn* v. *Wilson*, 343 U. S. 495.

The Act of August 26, 1950, could not have provided a constitutional basis for petitioner's termination on the facts of his case. Accordingly, and in line with its settled policy of restrictive statutory construction to avoid unconstitutionality, this Court must hold, if possible, that the Act of August 26, 1950, is not applicable to petitioner, a concededly loyal employee holding a non-sensitive, non-policy-making position in a non-sensitive agency. We think it clear that there is ample authority for the restrictive construction urged by petitioner. Indeed, not only is that construction possible, but necessary, for the construction of the statute by the court below is "plainly at variance with the policy of the legislation as a whole." *United States* v. *American Trucking Associations, Inc.*, 310 U. S.

534, 543. Cf. *Cox* v. *Roth*, 348 U. S. 207, 209. If the Executive Order is viewed merely as a blanket extension of the authority contained in Section 1 of the statute, this issue is focused on the Secretary's application of the statute to petitioner to terminate him pursuant to its provisions. Petitioner contends that the Secretary did not validly apply the statute to him and that, therefore, he was wrongfully denied his rights under the Lloyd-LaFollette and Veterans' Preference Acts. As previously noted, the text of the statute shows that it cannot be applied to petitioner, for the crucial standard for application of its provisions is contained in the phrase, "in the interest of the national security."

The court below did not deal in terms with this elemental question. Rather, it merely held that the discretion vested in the President under Section 3 of the Act permits him to extend its provisions to additional departments and, in doing so, he makes the statute applicable to all employment within these departments (226 F. 2d 337, 339, 340). But the court below erred in reading the statute as giving the President himself the power to dismiss individual employees (226 F. 2d at p. 340), for the text of the law plainly shows that it did not and he could not have validly assumed it. *United States* v. *Perkins*, 116 U. S. 483; *Eberlein* v. *United States*, 257 U. S. 82. Petitioner does not, of course, contend that the Secretary did not have the power to remove him for valid cause promotive of the efficiency of the service. Neither does he contend that the charges made against him could never, under any conceivable circumstances, be the basis for such removal, although obviously that question is premature and entirely conjectural in the context of this case. What he does contend is that there could be and was in fact no basis for his summary unappealable dismissal on the basis of these charges "in the interest of the national security."

The discretion vested in the Secretary by the statute and Executive Order was only discretion to act within the terms

of the statute (see Point II, *infra*). Moreover, it was subject to the condition that it could not be arbitrarily exercised. The majority in the court below ignored these limitations, for not only did the Secretary exceed her statutory discretion, but the decision to terminate petitioner in the name of a reason which simply did not apply to his case was patently arbitrary in the very sense of this Court's holding in *Wieman* v. *Updegraff*, 344 U. S. 183, 192.

The importance of the prohibition against arbitrariness is particularly emphasized in the case of public servants discharged as "security risks." In *Wieman, supra,* at p. 191, this Court noted the deep and lasting stigma attaching to persons dismissed from public service for such reasons, and in *Peters* v. *Hobby*, 349 U. S. 331, 347, it stated that "substantial rights affecting the lives and property of citizens are at stake." They are at stake here, too.

E. Appraisal and Summary

The defects in a man's character or the allegations against his friends are wholly irrelevant under the Act of August 26, 1950, unless he is in a position where such factors can hurt the national security. The law was not enacted to police the character and conduct of the civil service, for it was not intended to apply throughout the government. This is made clear in "*The Report on the Security Program*" (Appendix "B," *infra* at pp. 63-64):

> "Obviously, it was the intention of the Congress to limit the application of that authority to those departments and agencies whose employees, in the performance of their duties, might be in a position to endanger or compromise the national security. The term 'national security' is not defined in the law. It is clear, however, that the term does not relate to *all* functions and activities of the Federal Government; if so, the law would have been applicable to all departments and agencies."

On the conceded facts, the extraordinary authority granted agency heads by the Act of August 26, 1950, could not be used to discharge petitioner summarily on the grounds of security. If his discharge on some other ground or under some other authority was desired, he was entitled to all of the procedural rights provided him by the Veterans' Preference and Lloyd-LaFollette Acts. In creating an exception to those rights, Congress had the power to limit the exception as it previously had the power to create the rights thus excepted to. Yet in firing petitioner pursuant to the mandate of Executive Order 10450, the agency head ignored the plain limitations of her statutory authority. If the Secretary was free to do so, then the Executive is at liberty to ignore any Congressional limitation on the manner in which it may fire employees, and civil service laws can be repealed by Presidential fiat. The text of the statute, the intent of Congress as manifest in the history of the law, the common understanding of the Act as evidenced by considered administrative interpretations and by the obvious connotation of the words, "interest of the national security," all urge the same conclusion: the statute cannot be applied where there is no functional relation between the employment and the nation's defense, preparedness, and similarly related programs.[17]

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[17] Compare English policy as to Communists and Fascists in the civil service. Bontecou, *"The English Policy as to Communists and Fascists in the Civil Service,"* 51 Col. L. Rev. 564-586. The English program is limited to "work, the nature of which is vital to the security of the State" or "in current jargon, in connection with work that would involve access to 'secret' or 'top secret' material." Bontecou, *"The Federal Loyalty-Security Program"* (New York, 1953), p. 263; Biddle, *"Subversives in Government,"* ANNALS, American Academy of Political and Social Science, 1955, Vol. 300, p. 51, 59-60; Wilson and Glickman, *"The Problem of Internal Security in Great Britain, 1948-1953"* (New York, 1954), Chapter 2.

II

Executive Order 10450, which establishes a single minimum standard for all federal employment, was in excess of the Presidential authority conferred by Section 3 of the Act (5 U. S. C. 22-3) and invalidly precluded the agency head from exercising statutory discretion in petitioner's case.

As noted previously (Point I A, *supra*), the authority of the President under Section 3 of the Act of August 26, 1950 (5 U. S. C. 22-3) was limited solely to an extension of the statute to agencies not specifically included within its terms. Section 1 of the Act (5 U. S. C. 22-1), is *permissive* in application both as to "coverage" and "termination." However, a comparison of these permissive and discretionary statutory standards (pp. 17-20, *supra*), with the mandatory provisions of the Executive Order (see Executive Order 10450, Sections 4, 5, 6, 7), discloses that the discretionary standards of the statute have been transformed into the mandatory requirements of the Executive Order.

An assertion that Executive Order 10450 does not ignore the relative sensitivity of various positions in the executive branch of the government totally ignores the key section of that order—Section 7—which provides:

> "Any person whose employment is suspended * * * under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950, * * * shall not be reinstated or restored to duty or reemployed in the same department or agency * * * unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security * * *."

Therefore, the discretion directly vested by Congress in agency heads to suspend, terminate and reinstate sus-

pended employees is conditioned by the Executive Order in the case of reinstatement, on an affirmative finding by the agency head that the employee's retention is "clearly consistent with the interests of the national security," irrespective of the sensitivity of the employee's position. The President's exercise of his power under Section 3 of the Act (5 U. S. C. 22-3) to extend its provisions cannot be viewed in a vacuum without regard to what was extended, for the discretionary standards of a statute enacted to maintain the integrity of "classified information" and "material" have now been transformed into a rigid single standard upon which the job security of each and every federal employee depends.

Indeed, the President has found that the interests of the national security require that all federal employees be "reliable, trustworthy, of good conduct and character," as well as completely loyal (Preamble, Executive Order 10450). He also has found that all employees are to be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies of the entire government. These findings, we think, are wholly at odds with the meaning of the statute as previously discussed (Point I, *supra*), and with any reasonable construction of the President's power under 5 U. S. C. 22-3. For instance, it may be the essence of good government to require a mutually consistent and no less than minimum standard of "reliability," of "trustworthiness," of "good conduct and character," in traits of fish and wildlife employees, of wash room attendants, of food and drug inspectors, but surely it is not required "in the interest of the national security."

The division in the court below (226 F. 2d 337, 340-1), was apparently the result of a misunderstanding of the legislative scheme embodied in the statute. That scheme requires flexible standards for federal employees, depending upon the extent to which the national security interest

permeates the agencies in which they are employed, and the particular positions held by them within those agencies. (See "*The Report on the Security Program*," Appendix "B" *infra*, pp. 64-65). While the President clearly had the right to direct his subordinates to exercise their "discretion" in a manner consistent with the statute, he had no right whatever to deprive them of that discretion by *requiring* the dismissal of each and every employee who did not meet the mandatory Presidential standard. Even if we assume, *arguendo*, that the President had the power to extend the Act of August 26, 1950, to each and every agency of the government, he had no power to extend it to *each and every employee* in each and every agency, under a rigid single standard which precluded the exercise of any discretion on the part of the agency head, irrespective of the degree to which the employee's position affected the national security.[18] The extent to which the statute was to be applied within any particular agency was left specifically by Congress to the discretion of the agency head concerned. This issue does not involve the naked exercise of the Executive power: *Kendall* v. *United States ex rel. Stokes*, 12 Pet. 524, 37 U. S. 524. Rather, it involves that aspect of the Executive power which Congress has the right to reasonably restrict, regulate and direct. *United States* v.

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[18] Cf. Statement of former Senator Harry P. Cain, member of the Subversive Activities Control Board, *"Washington Post,"* January 16, 1955: "This criterion, that an accused applicant or employee must meet the test that his employment is 'clearly consistent with the interest of the (national security)' would and does, where literally applied, constitute a burden which can hardly be borne by anyone. It almost makes the employee affirmatively prove that the national interest requires the retention or continuation of his services. Who among us could do that? * * * 'Clearly consistent' can easily be construed to mean without doubts, real or fancied, of any kind. It can be read to mean that pure hearsay or malicious gossip or unsupported allegations constitute doubts to be resolved in favor of the Government. To my knowledge it has been so read. * * * Any system through which men and women are judged must provide the judges with room for judgment and discretion."

Perkins, 116 U. S. 483; *Myers* v. *United States*, 272 U. S. 52. In this connection, the President's order was not a valid exercise of the Executive power, but an unauthorized and invalid amendment of the Veterans' Preference and Lloyd-LaFollette Acts.

Indeed, throughout the extensive committee hearings on H. R. 7439, representatives of the Executive Branch assured Congress that the proposed statute would not become a substitute for the loyalty program established by Executive Order 9835, 12 F. R. 1935, and that in "loyalty" dismissals, the employee's right to appeal to the Civil Service Commission would be preserved. The Undersecretary of the Navy stated that while it was "manifestly proper and advisable to provide a review on the question of an individual's loyalty," such was not the case when it came to "security risks", in those agencies directly concerned with the preservation of "classified" information and material. *Hearings, House Committee on Post Office and Civil Service on H. R. 7439*, 81st Cong., 2nd Sess., March 30, 1950, p. 70. In this connection, the precise question was raised and answered in committee hearing:

> "Mr. Miller. * * * If this law is enacted will the Department of Defense use it as a blanket authority and group both loyalty and security risks under this one bill?
>
> "Mr. Larkin. We will not, Mr. Miller.
>
> "Mr. Miller. What assurance is there that you will not?
>
> "Mr. Larkin. Well, let me address myself to your question in this fashion: Under the Act as drafted, the authority granted, I think, clearly can be construed to give the Departments that are named in here the authority to handle both loyalty and security types of cases. It is our representation to the Congress that, if this bill is enacted, we will use the authority given for security cases only; that we will adhere to the present loyalty program of the President as spelled out in the Executive Order and as it

> results in an appellate board for loyalty cases in the form of the Richardson Board. * * * In the event that the President's loyalty program or the Executive order under which it operates is ever rescinded on the ground that the executive department or all executive departments as a whole do not need that continual further loyalty check, then, at such time but not until then would we use this authority for loyalty * * * I am not trying to speculate that it will; I am just pointing out that the authority here is broad enough so that, if it ever does, *the sensitive agencies could rely on the authority here.* That is the representation we are making in support of the bill, and I think you are entitled to rely on that representation." (*Hearings, House Committee on Post Office and Civil Service on H. R. 7439*, March 30, 1950, p. 59.) (Emphasis supplied.)

It is apparent that the President was given authority to extend the statute when necessary in the best interests of security to agencies other than those originally specified (5 U. S. C. 22-3.) Thereafter, the newly-included agency might use the "loyalty program" and the "security program" concurrently,[19] depending upon the "sensitivity" of the particular position within its ordinarily "non-sensitive" operations. The "sensitive" agencies, however, were permitted to treat "disloyalty" cases and "security risk" cases as one only in the event the loyalty program was rescinded ("on the ground that the executive department or all executive departments as a whole do not need that continual further loyalty check"). *Hearings, supra,* at p. 59. All that the President was authorized to do under Section 3 of the Act (5 U. S. C. 22-3) was either: to discontinue the loyalty program (Executive Order

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[19] See *e.g., Loyalty-Security Regulations,* Department of State, effective March 16, 1951, Sections 391.1, 396.42, 396.43; *Security Regulations,* Department of Defense, effective January 19, 1951, Sections 2(b), 3(a), quoted in Bontecou, *"The Federal Loyalty-Security Program"* (New York, 1953), pp. 323-335, 349. *"The Report on the Security Program,"* Appendix "B," *infra,* p. 66.

9835), at which time the "sensitive" agencies could treat loyalty and security cases as one; or to extend the Act to other agencies of the Government when deemed necessary in the best interests of national security, keeping the Government-wide loyalty program in effect. Thereupon, the various agency heads could have used both programs concurrently, "security" to supplement "loyalty," whenever necessary to protect the integrity of "classified" information or the "security" of a particular activity. What the President could not do, but what he did when Executive Order 10450 was promulgated (April 27, 1953, 18 F. R. 2489), was to extend the Act to *each and every employee* in each and every agency under a program based upon a single minimum standard—"clearly consistent with the interests of national security"—in substitution for a government-wide loyalty program. Congress expressly stated its intention to be otherwise. "[I]t is impossible to treat security risks and disloyal employees in the same manner." *H. Rep. No. 2330,* 81st Cong., 2nd Sess., p. 4 (1950); *S. Rep. No. 2158,* 81st Cong., 2nd Sess., p. 2 (1950). The Congressional recognition of this "impossibility" was based on its clear understanding that the problem of "loyalty" was government-wide, whereas the problem of "security" was restricted to "sensitive" areas of the government relating to the nation's security (Point I, *supra*).

That the mandatory requirements of Executive Order 10450 deprived the agency head of statutory discretion is clear from the conceded facts. Petitioner was a Food and Drug Inspector. His job consisted in inspecting for health, labelling and other regulatory purposes, the various foods, drugs and cosmetics subject to federal regulation under Title 21, United States Code. (See particularly 21 U. S. C. 374.) Inasmuch as respondents conceded that petitioner had no access to any government secrets or "classified material" and was not in a position to influence policy against the interests of the United States (R. 40), and

inasmuch as respondents asserted below that petitioner was not charged with "disloyalty," the termination of petitioner's employment as "necessary or advisable in the interest of the national security" was patently arbitrary.

The charges against petitioner concerned his personal associations, allegedly with members of the Communist Party, and his relations with an organization called the Nature Friends of America (Pet.'s Ex. 3, R. 16-18). After his dismissal, petitioner specifically offered to prove his innocence in these respects, *viz.*, that he had not knowingly maintained a sympathetic association with any Communist Party members, and that his nexus with the Nature Friends of America was of the most casual sort and had to do only with its activities for nature lovers (Pet.'s Ex. 10, R. 27). Although the Secretary apparently took these facts into consideration at the time of his dismissal (Pet.'s Ex. 13, R. 32), there was a refusal to reopen petitioner's case or rescind the order dismissing him.

The District Court held the dismissal valid, stating that "conceivably it is within the realm of possible contemplation" that a Food and Drug Inspector might impair the public health (125 F. Supp. 284, 288). How, the court did not state. This suggestion was as irrelevant as it was bizarre. Petitioner was not charged with being a saboteur, and as such he could have been no more dangerous than a private citizen employed in a food packing plant. See Yarmolinsky, "*Case Studies In Personnel Security*" (B. N. A., 1955), Case No. 136, pp. 170-172. The only way petitioner could have impaired the public health was if he intentionally contaminated food he was required to inspect, or if he intentionally failed to report evidence of contamination. In other words, if petitioner were disloyal, there was an exceedingly remote possibility that he might sabotage the food supply during a time of national emergency. But respondents conceded in the court below that petitioner was not charged with disloyalty.

It is well settled that where Congress has specified the grounds for removing federal employees and prescribed certain procedures, the judiciary will determine whether the mandate of Congress has been complied with (*United States* v. *Perkins*, 116 U. S. 483; *United States* v. *Wickersham*, 201 U. S. 390); in the absence of legislative restraint, however, this Court has generally refused to supervise the removal of inferior government employees by executive officials. *Myers* v. *United States*, 272 U. S. 52.

The mandate of Congress under which petitioner was fired provided that an employee may be discharged whenever the agency head:

> "* * * shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency head concerned *shall be conclusive and final.*" (Emphasis supplied.)

The emphasized portion of the quoted statute is worded almost exactly as the statute involved in *United States* v. *Williams*, 278 U. S. 255, which concerned adjusted compensation for veterans. That statute provided: "The decisions of the Secretary of War, the Secretary of the Navy, and the Director, on all matters within their respective jurisdictions under the provisions of this Act * * * shall be final and conclusive." In upholding the Administrator's decision, a unanimous Court ruled that the Administrator's decision is final, at least unless it be wholly without evidential support, or wholly dependent upon a question of law, or clearly arbitrary or capricious" (*id.* at pp. 257-258). In *Estep* v. *United States*, 327 U. S. 114, the statute provided that the classifications made by local draft boards "shall be final except where an appeal is authorized in accordance with such rules * * * as the President may prescribe." This Court ruled that the classification could be overturned only if it has "no basis in fact" (*id.* at p.

122). See *Dickinson* v. *United States*, 346 U. S. 389, 396; *Witmer* v. *United States*, 348 U. S. 375, 381.

Thus, while the Act of August 26, 1950, grants finality to the Secretary's determination to discharge or retain employees whenever in his discretion it is "necessary or advisable in the interests of the national security," it does not grant finality to the Secretary's determination that "black is white." Cf. *Dismuke* v. *United States*, 297 U. S. 167, 172. Indeed, in the present context we think it clear that the statute could not validly do so. Cf. *Wieman* v. *Updegraff*, 344 U. S. 183, 192. The pragmatic result was not hard to see. Cole was in a non-sensitive job, but that fact booted nothing for his retention. All along, the discretion of the Secretary, which was supposed to permit a weighing of the charges against him in relation to the sensitivity of his employment, was bound hand and foot by the supererogation of the President. The merest lip service might be paid to the intent of Congress, but the conclusion was foregone. Cf. *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260.

The Secretary could not have exercised "discretion" under the statute so as to ignore the mandatory provisions of the Executive Order, although no national security considerations were involved in petitioner's case. And while the Secretary had independent Cabinet rank, we cannot ignore the fact that Cabinet officers are chosen lieutenants of the President committed to the zealous execution of his politics, removable at his will (*Myers* v. *United States*, 272 U. S. 52), and unlikely to defy him, however strong the legal position in support of their doing so may be. See, e.g., *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579. Accordingly, there can be no question that in petitioner's case the agency head totally failed to consider the relationship between his job and the national security, for if that relationship was considered, the adverse determination, in the light of the *conceded* facts, was patently arbitrary.

III

Executive Order 10450's standard of employee discharge is inconsistent with the standard of employee discharge established by the Act of August 26, 1950.

Section 1 of the Act of August 26, 1950, establishes the standard to be followed by an agency head in determining whether a particular employee should be retained or terminated. The standard is set forth in the statute as follows:

> "The agency head concerned *may*, * * * terminate the employment of such suspended civilian officer or employee whenever he shall determine *such termination necessary or advisable in the interest of the national security of the United States* * * *." (Emphasis supplied.)

The Executive Order, on the other hand, establishes a different standard for retention or termination, namely, that unless retention is established affirmatively to be "clearly consistent with the interests of the national security," the employee *must* be terminated. (See Executive Order 10450, Sections 2, 4, 5, 6 and 7.)

As has already been stated, the power granted to the President by the Act of August 26, 1950, Section 3, was limited to an extension of Section 1 to departments and agencies not initially made subject to the Act. It is clear that the President had no authority to revise the statutory standard to be used by agency heads in arriving at a particular determination, for, even if it be conceded that the President could extend the provisions of the Act of August 26, 1950, to every department and agency of the Federal Government, it is obvious that he could not prescribe standards thereunder more onerous than those established by Congress. *Addison* v. *Holly Hill Fruit Products*, 322 U. S. 607, 616, 618; *Miller* v. *United States*, 294 U. S. 435, 440.

Prior to the issuance of Executive Order 10450, the standard for employee termination under the Act of August 26, 1950, was administratively interpreted by various security regulations issued pursuant to the authority of the statute. For example, Section 393.1 of the *Loyalty-Security Regulations* of the Department of State, effective March 16, 1951, provided:

> "393.1 *Security Standard.* The standard for removal from employment in the Department of State under Public Law 733, 81st Congress, shall be that on all the evidence reasonable grounds exist for belief that the removal of the officer or employee involved is necessary or advisable in the interest of the national security." (Quoted in Bontecou, "*The Federal Loyalty-Security Program*," *supra*, at pp. 325-326.)[20]

However, under the "clearly consistent" standard established by the Executive Order, all doubts are now required

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[20] See also: *Security Regulations, Department of Defense, Section 4(a)*, effective January 19, 1951 (quoted in Bontecou, *supra*, p. 349); *Loyalty-Security Regulations, for Army Civilian Personnel*, Section 7(a), (SR 620-220-1, Par. 7a, effective November 13, 1950).

[21] Compare the standard used by perhaps the most "sensitive" agency—the Atomic Energy Commission—which is specifically excluded from the Act of August 26, 1950 (5 U. S. C. 22-2):

> "The decision as to security clearance is an overall, commonsense judgment, made after consideration of all the relevant information as to whether or not there is risk that the granting of security clearance would endanger the common defense or security. If it is determined that the common defense or security will not be endangered, security clearance will be granted; otherwise, security clearance will be denied." *Hearings, Senate Subcommittee, Committee on Government Operations, on S. J. Res. 21*, 84th Cong., 1st Sess., March 10, 1955, p. 286; Biddle, "*Subversives in Government*," ANNALS, American Academy of Political and Social Science, 1955, Vol. 300, at p. 59.

to be resolved in favor of the government.[21] John Lord O'Brian put it thus:

> "In fact, if there is any presumption recognized in this field, it would seem to be a presumption of guilt. As I have said, the present Executive Order requires an affirmative finding that employment shall be clearly consistent with national security. And this qualification is generally interpreted to mean that every doubt must be resolved in favor of the government." (O'Brian, "*National Security and Individual Freedom*" (Cambridge, 1955), p. 64.)[22]

When the agency head applied Executive Order 10450 to petitioner, which the Executive Order required, and found that it required his dismissal, a more onerous standard of judgment ("clearly consistent with the interests of the national security") was used than that provided by the Act of August 26, 1950 ("necessary or advisable in the interest of the national security"). Indeed, the agency head never made a determination that petitioner's dismissal was "necessary or advisable in the interest of the national security of the United States," the standard established by Congress (Pet.'s Ex. 6, R. 21). Previously, the Court below had noted that such a change of standard can be decisive of an employee's loyalty or security status. See *Jason* v. *Summerfield* (C. A. D. C.), 214 F. 2d 273, 276, cert. den., 348 U. S. 840.

Chief Judge Edgerton's dissent below makes it clear that the standard of Executive Order 10450 "differs vitally from the 'necessary or advisable' test that Congress prescribed."

> "The difference is closely parallel to that between the test, 'reasonable grounds exist for belief that the

[22] See also: M. S. Livingston, "*Science and Security*," ANNALS, American Academy of Political and Social Science, 1955, Vol. 300, p. 7; Bagdikian, "*What Price Security?*" Providence Journal-Bulletin, March-April, 1955, at p. 5; Cain, op. cit., *supra*, note 18.

> person involved is disloyal;' used in Executive Order 9835; and the test, 'There is a reasonable doubt as to the loyalty of the person involved,' used in the later Executive Order 10241. As this court has held, that 'amended standard applied a more rigid test of suitability for government employment. It contemplated the possible existence of proof or information which, while not capable of inducing a belief that the person "is disloyal" does cause a reasonable doubt as to whether he is in fact loyal' * * *. Just so here, the amended standard applied a more rigid test of suitability for government employment. It contemplated the possible existence of information which, while not capable of inducing a belief that the person's dismissal is 'necessary or advisable in the interests of national security,' does cause a reasonable doubt as to whether his continued employment is consistent with the interests of national security. Under the new standard, but not under the old, no matter how important to the country a man's continued employment may be, he must be dismissed if there is doubt about him from a security standpoint. The new standard gives employees less protection than Congress authorized, and thereby makes a deeper inroad on the safeguards of the Lloyd-LaFollette Act and the Veterans' Preference Act." (226 F. 2d 337, 342-3).

Accordingly, the Executive Order, insofar as it purports to deprive petitioner of the protections of the Veterans' Preference and Lloyd-LaFollette Acts, is void. The President had no power under Section 3 of the Act (5 U. S. C. 22-3) to create a more onerous burden on the suspended employee than the one provided by statute. See, e.g., *Manhattan General Electric Co.* v. *C. I. R.*, 297 U. S. 129, 134; *International Railway Co.* v. *Davidson*, 257 U. S. 506; *Waite* v. *Macy*, 246 U. S. 606, 609; *Morrill* v. *Jones*, 106 U. S. 466.

IV

The notice of dismissal was not "a written statement of the decision" of the agency head.

The decision of the agency head on January 15, 1954, terminating petitioner's employment effective January 20, 1954, as "not clearly consistent with the interests of national security" (Pet.'s Ex. 6, R. 21) [23] failed to set forth any of the reasons for the determination except to refer to the letter of charges (Pet.'s Ex. 3, R. 16-18) and petitioner's letter of December 23, 1953, wherein he refused to make any explanation of his associations and stated that he would continue to associate with whom he pleased (Pet.'s Ex. 4, R. 19). The action of the agency head on January 15, 1954, was thus in direct violation of the Act of August 26, 1950's requirement that the employee receive "a written statement of the decision of the agency head". Cf. *Mulligan* v. *Andrews* (C. A. D. C.), 211 F. 2d 28; *Deak* v. *Pace* (C. A. D. C.), 185 F. 2d 997.

The Act of August 26, 1950, permits summary dismissal when, in the discretion of the agency head, such action is "necessary or advisable in the interest of the national security". It does not permit summary dismissal when the agency head reasons that every "Republican, Jew or Negro" is a "poor security risk," *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100. Yet, without "findings" this Court would find it difficult to review such a dismissal. "We must know what a decision means before the duty becomes ours to say whether it is right or wrong," *United States* v. *Chicago, M. St. P. & R. RR.*, 294 U. S. 499, 511.

[23] The dismissal notice did not use the statutory standard—"necessary or advisable in the interest of the national security" (5 U. S. C. 22-1). It used the formulary phrase of Executive Order 10450, "clearly consistent with the interests of national security" (Pet.'s Ex. 6, R. 21).

Judge Frank's observation, in *United States* v. *Forness* (2 Cir.) 125 F. 2d 928, 942, that "Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper," is particularly appropriate in "security risk" cases. As one observer put it:

> "One other safeguard against arbitrary action is lacking in present security processes—a statement of reasons for each decision. As one lawyer put it to an agency head: 'Try getting your reasons for dismissing this man down on paper. I think you will be so ashamed of them you will change your mind' ". (Lewis, "*Our Security Program Need Not Be Unfair,*" *The Reporter,* November 4, 1954, at p. 22.)

The statutory requirement of a "written statement of the decision of the agency head" was calculated by Congress as insurance that the actual decision be made by the agency head and that the purposes of the statute not be misused under the cloak of national security. *S. Rep. No. 2158,* 81st Cong., 2nd Sess., p. 3 (1950). Indeed, the requirement of personal review by the agency head was the principal reason for Congressional willingness to forego an independent review procedure for dismissals under the Act. (*Hearings, House Committee on Post Office and Civil Service, on H. R. 7439,* 81st Cong., 2nd Sess., March 30, 1950, pp. 61-63, 69, 89, 91-96; see also: 96 C. R., pp. 10019-10020, statement of Congressman Rees.) Thus, it cannot seriously be contended that the more recitation of the Executive Order's formulary phrase satisfies the requirements of the statute. Even the minimum safeguard provided by the fact that people usually read what they sign is then an empty one; a rubber stamp would do as well.

The need for a statement for the grounds of the decision to terminate an employee under the statute is evident here. There were five charges against petitioner. Whether or not he availed himself of the hearing to which he was entitled by law, the agency head was required, in arriving at a

decision, to consider these charges in relation to the nature of the job held by petitioner and he was entitled to know which of the charges proved fatal to him. Of course, he was also entitled to the assurance that his dismissal was in fact based on those charges. Further, the observance of this procedure was perhaps decisive to petitioner's chances for reinstatement in another position. Neither the statute nor the Executive Order foreclosed him from seeking clearance for another position felt to be "less sensitive," but the failure to give him the reasons for his dismissal made such an attempt immeasurably harder.

This Court has repeatedly ruled that where Congress has prescribed conditions for the exercise of administrative action, the "decision" of the administrative body must set forth the "reasons" for that action. See, e.g., *Secretary of Agriculture* v. *United States*, 347 U. S. 645, 654; *Securities Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 94-95; *Florida* v. *United States*, 282 U. S. 194. In judicial parlance, "decision" sometimes means not only the result, but the reasons for that result. *Lambros* v. *Young* (C. A. D. C.) 145 F. 2d 341, 343, ftn. 2. In administrative parlance, as Congress uses that term, "decision" means the "reasons," or the basis for the administrative result, as well as the result itself. *Administrative Procedure Act*, Section 8(b), 60 Stat. 242, 5 U. S. C. 1007(b); *Attorney General's Manual on the Administrative Procedure Act* (1947) pp. 86-87.

It has been said, and not without justification, that the requirement of administrative findings is "to assure against Star Chamber methods," *Saginaw Broadcasting Company* v. *Federal Communications Commission* (C. A. D. C.), 96 F. 2d 554, 559, cert. den., 305 U. S. 613. In the present context that statement is fitting, for, as the dissent below observed: "Unless reasons are given, no safeguard [against arbitrary action] is provided." (226 F. 2d 337, 343.) Clearly, the statutory procedure demanded that the Secretary set out with reasonable specificity the reasons for

dismissing petitioner. Otherwise, it was meaningless. This minimum statement was wanted if only to insure that the grounds for dismissal were contained within the original charges. Without such assurance, the other procedural requirements of the statute are next to worthless, for the employee may tilt with a straw man while the real menace stands behind him unseen.

CONCLUSION

For the foregoing reasons, the judgment of the Court below should be reversed with directions to require the granting of judgment on the pleadings in favor of petitioner, together with such other relief as may be appropriate.

Respectfully submitted,

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APPENDIX "A"

Act of August 26, 1950, c. 803, 64 Stat. 476, 5 U. S. C. Sections 22-1, *et seq.*, Public Law 733, 81st Cong. 2nd Sess.

5 U. S. C. SECTION 22-1: (PUBLIC LAW 733, SECTION 1)

Notwithstanding the provisions of section 652 of this title, or the provisions of any other law, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board; or the Director, National Advisory Committee for Aeronautics, may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee of the Department of State (including the Foreign Service of the United States), Department of Commerce, Department of Justice, Department of Defense, Department of the Army, Department of the Navy, Department of the Air Force, Coast Guard, Atomic Energy Commission, National Security Resources Board, or National Advisory Committee for Aeronautics, respectively, or of their several field services: *Provided,* That to the extent that such agency head determines that the interests of the national security permit, the employee concerned shall be notified of the reasons for his suspension and within thirty days after such notification any such person shall have an opportunity to submit any statements or affidavits to the official designated by the head of the agency concerned to show why he should be reinstated or restored to duty. The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency

head concerned shall be conclusive and final: *Provided further*, That any employee having a permanent or indefinite appointment, and having completed his probationary or trial period, who is a citizen of the United States whose employment is suspended under the authority of sections 22-1 to 22-3 of this title, shall be given after his suspension and before his employment is terminated under the authority of said sections, (1) a written statement within thirty days after his suspension of the charges against him, which shall be subject to amendment within thirty days thereafter and which shall be stated as specifically as security considerations permit; (2) an opportunity within thirty days thereafter (plus an additional thirty days if the charges are amended) to answer such charges and to submit affidavits; (3) a hearing, at the employee's request, by a duly constituted agency authority for this purpose; (4) a review of his case by the agency head, or some official designated by him, before a decision adverse to the employee is made final; and (5) a written statement of the decision of the agency head: *Provided further*, That any person whose employment is so suspended or terminated under the authority of said sections may, in the discretion of the agency head concerned, be reinstated or restored to duty, and if so reinstated or restored shall be allowed compensation for all or any part of the period of such suspension or termination in an amount not to exceed the difference between the amount such person would normally have earned during the period of such suspension or termination, at the rate he was receiving on the date of suspension or termination, as appropriate, and the interim net earnings of such person: *Provided further*, That the termination of employment herein provided shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government: *Provided further*, That the head of any department or agency considering the appointment of any

person whose employment has been terminated under the provisions of said sections may make such appointment only after consultation with the Civil Service Commission, which agency shall have the authority at the written request of either the head of such agency or such employee to determine whether any such person is eligible for employment by any other agency or department of the Government.

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5 U. S. C. Section 22-3: (Public Law 733, Section 3)

The provisions of sections 22-1 to 22-3 of this title shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security. If any departments or agencies are included by the President, he shall so report to the Committees on the Armed Services of the Congress.

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Act of June 27, 1944, c. 287, Section 14, 58 Stat. Section 14 of the Veterans' Preference Act, 5 U. S. C., Section 863.

No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons,

specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: Provided, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends . . .

* * * *

Act of August 24, 1912, c. 389, Section 6, 37 Stat. 555, as amended June 10, 1948, c. 447, 62 Stat. 354, Section 6(a) of the Lloyd-LaFollette Act, 5 U. S. C., Section 652(a).

No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on

such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reason for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person effected and to the Civil Service Commission . . .

* * *

Executive Order No. 10450

Apr. 27, 1953, 18 F. R. 2489, as amended by Executive Order No. 10491, Oct. 15, 1953, 18 F. R. 6583.

Security Requirements for Government Employees

Whereas the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

Whereas the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privilege to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

Appendix "A"

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U. S. C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U. S. C. 632, *et seq.*); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U. S. C. 118 j); and the act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22-1, *et seq.*), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

SEC. 1. In addition to the departments and agencies specified in the said act of August 26, 1950, and Executive Order No. 10237 of April 26, 1951, the provisions of that act shall apply to all other departments and agencies of the Government.

SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

* * * *

SEC. 4. The head of each department and agency shall review, or cause to be reviewed, the cases of all civilian officers and employees with respect to whom there has been conducted a full field investigation under Executive Order No. 9835 of March 21, 1947, and, after such further investigation as may be appropriate, shall re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, such of those cases as have not been adjudicated under a security standard commensurate with that established under this order.

SEC. 5. Whenever there is developed or received by any department or agency information indicating that the reten-

tion in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.

SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security in accordance with the said act of August 26, 1950.

SEC. 7. Any person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the

interests of the national security which finding shall be made a part of the records of such department or agency: *Provided*, that no person whose employment has been terminated under such authority thereafter may be employed by any other department or agency except after a determination by the Civil Service Commission that such person is eligible for such employment.

SEC. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(iv) An adjudication of insanity, or treatment for serious mental or neurological disorder without satisfactory evidence of cure.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

(2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

(6) Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another

government in preference to the interest of the United States.

(8) Refusal by the individual, upon the ground of constitutional privilege against self-incrimination, to testify before a congressional committee regarding charges of his alleged disloyalty or other misconduct.

• • •

SEC. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked. For the purposes described in section 11 hereof the Loyalty Review Board and the regional loyalty boards of the Civil Service Commission shall continue to exist and function for a period of one hundred and twenty days from the effective date of this order, and the Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency.

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APPENDIX "B"

A REPORT

BY THE

INTERDEPARTMENTAL COMMITTEE ON INTERNAL SECURITY

ON

THE GOVERNMENT EMPLOYEE SECURITY PROGRAM

AS SUBMITTED TO

THE PRESIDENT

BY THE

NATIONAL SECURITY COUNCIL

(April 29, 1952, White House Mimeograph Release No. 3326, August 8, 1952)

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* * *

IV. CONCLUSIONS

1. *An employee security program must be limited to the legitimate interest of national security.* Section 6 of the Act of August 24, 1912 (Lloyd-LaFollette Act) provides for the suspension and removal of employees from the classified service "for such cause as will promote the efficiency of such service." Historically, the rules and regulations of the Civil Service Commission have provided that appointment in the competitive service may be denied to applicants for a number of reasons. These reasons, which are generally referred to as relating to "suitability," are listed in section 2.104 of the Commission's regulations. They include the standard which is prescribed in Executive Order 9835 to govern denial of or removal from employment on the grounds of loyalty. The same grounds which justify denial of appointment in the competitive civil service will also justify removal of an employee from that service.

It may be seen, therefore, that even in the absence of an employee security program or security legislation, a person may be denied employment, or removed from employment, in the Federal civil service for a number of reasons. This has led many persons to question the need for a formal "security" program, superimposed on the existing programs relating to loyalty and suitability. It is the opinion of the Committee that an employee security program is justified, *within limits,* in order to afford the fullest possible protection to the national security. A program such as may be established under Public Law 733, affords the necessary authority to agency heads for getting questionable employees quickly out of sensitive positions when other remedies are not available. It also permits appropriate action to be taken to protect the Government against persons who may knowingly or unknowingly endanger the national security even though there may not be "reasonable doubt" as to their loyalty.

An employee security program, as in the case of the Employee Loyalty Program, is a special program which can be justified in these times. As such, it must be applied only to the extent required "in the interest of national security." Further, it is not required as, nor should it become, a substitute for the programs which have been established to handle cases of applicants or employees of doubtful loyalty or doubtful suitability.

Not all departments and agencies of the Government will have need of an employee security program since the national security, in the sense contemplated, will not be involved in their operations. Public Law 733 provides authority to suspend and remove employees "in the interest of the national security." This authority is limited to those departments and agencies named therein, and to such other departments and agencies as may be designated by the President "in the best interests of national security." Obviously, it was the intention of the Congress to limit the

application of that authority to those departments and agencies whose employees, in the performance of their duties, might be in position to endanger or compromise the national security. The term "national security" is not defined in the law. It is clear, however, that the term does not relate to *all* functions and activities of the Federal Government; if so, the law would have been applicable to all departments and agencies. In a general sense, it appears that "national security" as used in Public Law 733 relates to the ability of the country to protect and defend itself against hostile or destructive action, overt or covert, including enemy military action. . . . Any act, or failure to act, which would have the effect of weakening or compromising this ability can be said to endanger the national security. Any department or agency whose functions are such that acts, or failures to act, on the part of employees would have this effect will have need of an employee security program.

On the other hand, acts or failures to act which would have no direct bearing upon the ability of the country to protect and defend itself against hostile or destructive action, cannot be said to endanger the national security. This is true even though such act, or failure to act, may be a breach of confidence or trust; may cause embarrassment to a department or agency of the Government, or to a Government official or officials, or to private citizens; may cause financial loss to the Government or unjust enrichment of a person or persons; or may endanger a non-security program of the Government. Thus, many departments and agencies are responsible for functions which, while they are intimately connected with the welfare and happiness of the people of this country, are not directly related to the national security as that term is used in connection with an employee security program.

Furthermore, even in those departments and agencies which have need of an employee security program, not *all* positions in the department or agency will necessarily be

concerned with the "national security," and therefore not all employees will be in a position to compromise or endanger the national security. The program must be applicable only with respect to those positions, which may be designated as "sensitive positions," whose incumbents might be in position to endanger the national security.

These facts will serve to limit an employee security program to: (1) Those departments or agencies, or parts thereof, whose functions are concerned with the "national security"; (2) Those positions which may be designated as "sensitive"; and (3) Those adverse actions against employees in or applicants for sensitive positions which cannot appropriately be taken either under the loyalty program or for reasons of general suitability under civil service rules and regulations (pp. 13-16).

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V. Recommendations

1. In the interest of promoting uniformity in determining the need for and the extent of employee security programs in the various departments and agencies there should be definitions of the key terms "national security" and "sensitive position." For this purpose the following definitions are recommended:

> The term *national security* as used herein relates to the safeguarding of the United States against any attempt to destroy or weaken it by force or violence, subversion, or any other means. Within the area required to be safeguarded are military, foreign relations, and related matters of the Government, the disclosure or compromise of which would aid our enemies or would endanger our defense. As used herein the term national security does not include questions of policy or judgment with respect to other Government matters relating to the general welfare, health and happiness of our people in their economic

and political life, not requiring security classification. *Sensitive position* means (1) Any position the duties or responsibilities of which require that the incumbent have access to security information or material, classified "Confidential", "Secret" or "Top Secret"; and (2) Any position which exists in an organizational entity where, because of the nature of the work being done, the very presence of the incumbent would make it possible for him to obtain possession of security information or material, classified "Confidential", "Secret" or "Top Secret", or to commit acts which would directly endanger the national security.

2. The head of each department and agency of the Federal Government should be responsible for identifying the sensitive positions, if any, in his department or agency, using the uniform definition of "sensitive position."

3. Based upon his review and identification of sensitive positions, the head of each department and agency to which Public Law 733, 81st Congress, is not already applicable should decide whether, in his opinion, there is need for an employee security program in his department or agency. If he decides after consultation with ICIS that such program is necessary, he should request issuance of Executive Order authority through normal channels for extension of the provisions of Public Law 733 to his department or agency.

4. Employee security programs should not be construed to replace, change or otherwise modify the Federal Employee Loyalty Program or the laws, and the rules and regulations of the Civil Service Commission, relating to suitability for employment in the competitive civil service. In any individual case the program most properly applicable should be utilized for its disposition (pp. 27-28).